

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1081

DONALD LEE DAWSON,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN H. SACHS,
Attorney General
of Maryland,

STEPHEN ROSENBAUM,
Assistant Attorney General,
One South Calvert Building,
Calvert and Baltimore Streets,
Baltimore, Maryland 21202,
Counsel for Respondent.



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PRELIMINARY COMMENT

This Brief of Respondent in Opposition to Petition for Writ of Certiorari is filed pursuant to the request of this Court dated February 22, 1979.

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland, *Dawson v. State*, No. 1010 (Md. App., filed Aug. 2, 1978), is unreported and appears in Petitioner's Petition for Writ of Certiorari [hereinafter Petition] at 1a-14a. The order of the Court of Appeals of Maryland denying Petitioner's Petition for Writ of Certiorari,

Dawson v. State, Petition Docket No. 298 (Md., filed Oct. 9, 1978), appears in Petition at 15a.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Should this Court grant review in the instant case of the opinion of the Court of Special Appeals of Maryland with respect to the propriety of the attachment of a pen register where the decision in *Smith v. Maryland*, No. 78-5374, pending in this Court, will either result in affirmance of that opinion or suggest that a remand to the Court of Special Appeals is in order?
2. Did the Court of Special Appeals properly determine that the language in the affidavit in support of the wiretap application as to the futility of utilizing other investigative techniques (such as personal contact and search warrants, the only techniques asserted to the Court of Special Appeals as necessary to be utilized in addition to the enumerated techniques employed) before wiretapping was sufficient under 18 U.S.C. § 2518(1)(c)?
3. Was Petitioner, who has never asserted his inability to pay the fine imposed as a condition of probation, denied equal protection where compared with an indigent person who would have been incarcerated without having been given the opportunity to avoid incarceration, which issue was not before the Court of Special Appeals and cannot be the subject of an appeal of a speculative probation revocation?

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

In addition to 18 U.S.C. § 2518(1)(c), reprinted in Petition at 8, the following statutes and rules are involved:

Md. Ann. Code art. 27, § 594(D)(a)

Md. Ann. Code art. 27, § 551(a)

Md. Ann. Code art. 38, § 4(a) and (b):

§ 4. Directions as to payment of fine; failure to pay fine; collection in civil action; costs not part of penalty.

(a) When a court imposes a fine upon an individual, the court may direct as follows:

(1) That the defendant pay the entire amount of the fine at the time sentence is imposed; or

(2) That the defendant pay the fine in specified portions or installments at designated periodic intervals, and in such case may direct that the fine be remitted to a probation agency or officer, who shall report to the court in the event of any failure to comply with the order; or

(3) Where the defendant is sentenced to a period of probation as well as a fine, that payment of the fine be a condition of the sentence.

(b) If the defendant fails to pay the fine as directed (and costs shall not constitute a part of any fine), or if he is unable to pay the fine and so represents upon application to the court, the court, after inquiring into or making such further investigation, if any, which it may deem necessary with regard to the defendant's financial and family situation and the reasons for nonpayment of the fine, including whether such nonpayment was contumacious or was due to indigency, may enter any order which it could have entered under subsection (a) of this section, or may reduce the fine to an amount which the defendant is able to

pay, or may direct that the defendant be imprisoned until the fine (or any portion of it remaining unpaid or remaining undischarged after a pro rata credit for any time which may already have been served in lieu of payment) is paid; and the court shall determine and specify, in the light of the defendant's situation and means and of his conduct with regard to the nonpayment of the fine, the period of any imprisonment in default of payment of the fine, subject to the following limitations:

(1) In no event shall such period of imprisonment exceed one day for each ten dollars (\$10.00) of the fine.

(2) Where the fine was imposed for an offense subject to punishment by imprisonment or fine, or both, such period shall not exceed one third of the maximum term authorized by statute or ordinance for such offense or ninety (90) days, whichever may be less.

(3) Where the fine is imposed for an offense for which imprisonment is not an authorized penalty (whether by statute or ordinance or by common law) in the absence of default in payment of a fine, such period shall not exceed fifteen days.

(4) Where a sentence of imprisonment as well as a fine was imposed, the aggregate of such term and of the original sentence of imprisonment shall not exceed the maximum authorized term of imprisonment.

Fed. R. Crim. P. 41(b) and (h).

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case except that Petitioner's assertion that "[t]he attachment was made on a line leased by Prince George's Police Department between Dawson's house and the telephone company switching station," Petition at 4, is without support in the record.

ARGUMENT

I.

THE ISSUE OF WHETHER IN THE INSTANT CASE THE ORDER, PROPERLY DETERMINED BY THE COURT OF SPECIAL APPEALS AND CONCEDED BY RESPONDENT TO HAVE BEEN A SEARCH WARRANT, AUTHORIZING THE ATTACHMENT OF A PEN REGISTER WAS SUPPORTED BY ANY STANDARD OF PROBABLE CAUSE ENVISIONED BY PETITIONER IS NOT REVIEWABLE BECAUSE *SMITH V. MARYLAND* IS PENDING IN THIS COURT AND BECAUSE, IN VIEW OF THE COURT OF APPEALS' DECISION IN *SMITH*, THE COURT OF SPECIAL APPEALS DECLINED TO RULE THEREON.

The issue of whether the attachment of a pen register constitutes a Fourth Amendment intrusion is before this Court in *Smith v. Maryland*, No. 78-5374, in which the decision of the Court of Appeals of Maryland in *Smith v. State*, 283 Md. 156 (1978), will be reviewed. The Court of Special Appeals, in light of the decision of the Court of Appeals of Maryland in *Smith*, declined, in the instant case, to decide whether the order authorizing the attachment of the pen register, conceded by Respondent and acknowledged by the Court of Special Appeals to have been a search warrant, was supported by sufficient probable cause. Petition at 3a.

The Court of Special Appeals properly determined that the order in the instant case was a search warrant. *Id.* Pursuant to Md. Ann. Code, art. 27, § 594D(a), "[e]very District Court judge may issue warrants of arrest and warrants for search and seizure or for interception of communications. . ." [Emphasis added.] What the District Court of Maryland issued in the instant case was obviously not an arrest warrant; nor, in view of the description of a pen register in *United States v. Giordano*, 416 U.S. 505, 549 n.1 (1974) (Powell, J., concurring in part, dissenting in part), could it have been a warrant for the "interception of communications." According to then Md. Ann. Code art. 27, § 551(a), warrants for search and seizure are

"directed to any duly constituted policeman, or police officer *authorizing him to search* such suspected individual, building, apartment, premises, place or thing, *and to seize any property* found liable to seizure under the criminal laws of this State. . ." (Emphasis added.)

This section is more general in scope as to what may be seized than the comparable Fed. R. Crim. P. 41(b) and (h), which provide:

"(b) Property Which May Be Seized with a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.

....
 (h) . . . The term 'property' is used in this rule to include documents, books, papers and any other tangible objects."

This Court concluded in *United States v. New York Telephone Co.*, ____ U.S. ___, ___, 98 S. Ct. 364, 370-71 (1977), that Fed. R. Crim. P. 41 was broad enough to include the seizure of dial impulses recorded by pen registers. Thus, if Fed. R. Crim. P. 41 encompasses information obtained from a pen register, then the broader Maryland rule also includes the seizure of the impulses.

Because the Court of Special Appeals found it unnecessary to determine whether the order was supported by sufficient probable cause, the question posed by Petitioner, i.e., "[W]hat standard of probable cause is required for the installation of a dialed number recorder?", should be held in abeyance until this Court

decides *Smith*. Should the State of Maryland prevail in *Smith*, the Petition herein on this question would become moot and should obviously be denied; should Smith prevail, this case should then be remanded to the Court of Special Appeals for a determination of whether the search warrant is supported by sufficient probable cause to satisfy the guidelines set out in *United States v. Ventresca*, 380 U.S. 102, 108-09 (1965), or any lesser standard envisioned by Petitioner. Petition at 7-8.¹ See, e.g., *Burko v. Maryland*, 422 U.S. 1003 (1975).

II.

THE COURT OF SPECIAL APPEALS PROPERLY HELD THAT THE LANGUAGE IN THE AFFIDAVIT AS TO THE FUTILITY OF UTILIZING INVESTIGATIVE TECHNIQUES, SUCH AS PERSONAL CONTACT AND SEARCH WARRANTS, BEFORE WIRETAPPING WAS SATISFACTORY UNDER 18 U.S.C. § 2518(1)(c) AND, IN SO HOLDING, NOTED THAT ALL THE OTHER TECHNIQUES WHICH PETITIONER ASSERTED TO THE COURT OF SPECIAL APPEALS AS NECESSARY TO USE WERE IN FACT USED.

Regardless of which standard (assuming, without conceding, that they are differing) is used to measure compliance with 18 U.S.C. 2518(1)(c), i.e., "mere substantial compliance and only a de minimus showing" or "more than mere rote recitation of boilerplate language is required" (see Petition at 9), the Court of Special Appeals properly held that the statement of other investigatory techniques was sufficient. Petition at 5a-8a. In so holding, Petitioner's assertion that search warrants were required as an investigatory technique prior to wiretapping because they were "successful involving the petitioner in the past," Petition at 11, was disposed of.

¹ The numerous allegations of non-innocuous activity by Petitioner in some 22 paragraphs in the lengthy affidavit would surely satisfy even the most stringent interpretation of the *Ventresca* guidelines.

In response to the four questions — which add up to but one question, *i.e.*, "How exhaustive must the recitation of investigatory techniques be to satisfy § 2518(1)(c)?" — posed by Petitioner (Petition at 10) as to why this issue is worthy of review, it should be noted that case law makes clear there is no necessity "that the Government explain away *all* possible alternative techniques, since the Government is not required to use a wiretap only as a last resort." *United States v. Matya*, 541 F.2d 741, 745 (8th Cir. 1976) (emphasis in original). In any event, of the two techniques that Petitioner asserted to the Court of Special Appeals of Maryland as not used prior to wiretapping, the affidavit explained the failure to initiate direct contact, Petition at 7a, and the summary statement therein that a search warrant, *e.g.*, would be unlikely to succeed was so logical that it was fully comprehensible by the Court of Special Appeals. Petition at 7a-8a. In the instant case, therefore, the Circuit Court for Prince George's County, Maryland was informed of all that was necessary "with respect to the exhaustion of other investigative techniques." Petition at 10. To conclude, the techniques which were asserted by Petitioner to the Court of Special Appeals as necessary to utilize were, in the instant case, either listed in the affidavit as utilized, Petition at 7a, or the futility of so employing them was explained or, as in the obvious situation of the failure to use a search warrant, alluded to.

III.

PETITIONER, WHO HAS NEVER ASSERTED HIS INABILITY TO PAY THE FINE IMPOSED AS A CONDITION OF PROBATION, WAS NOT DENIED EQUAL PROTECTION WHERE COMPARED WITH AN INDIGENT PERSON WHO WOULD HAVE BEEN INCARCERATED WITHOUT HAVING BEEN GIVEN THE OPPORTUNITY TO AVOID INCARCERATION, WHICH ISSUE WAS NOT BEFORE THE COURT OF SPECIAL APPEALS AND CANNOT BE THE SUBJECT OF AN APPEAL OF A SPECULATIVE PROBATION REVOCATION.

The instant case is not one wherein an individual was denied equal protection because the aggregate imprisonment exceeded the statutory maximum and resulted directly from the *involuntary non-payment* of a fine, *Williams v. Illinois*, 399 U.S. 235 (1970), or because of incarceration while a person of financial means remains free. *Barnett v. Hopper*, 548 F.2d 550 (5th Cir. 1977), *vacated as moot*, No. 77-177 (U.S., filed Dec. 11, 1978); *Hunter v. Dean*, 239 S.E.2d 791 (Ga. 1977), *cert. dismissed as improvidently granted*, No. 77-6248 (U.S., filed Dec. 11, 1978). Nor does Petitioner, who, contrary to the statement in Petition at 10-11, at no place in the record has indicated an inability to pay the fine, assert that he is being treated differently than any other similarly situated person. Rather, Petitioner apparently has taken the unique, but patently frivolous, view that, as between him and an indigent person who would have been incarcerated without having been given the opportunity to avoid incarceration on the condition that a fine be paid, he is being discriminated against.

Because Petitioner's Motion to Set Appeal Bond was granted, such that the conditions of probation have been stayed pending the exhaustion of the appellate process, whether Petitioner can or will pay the fine, legally imposed pursuant to Md. Ann. Code art. 38, § 4(a), is yet speculative. Should the Petition herein be denied and should Petitioner not pay the fine within 90

days of the date of denial, Petitioner would still be entitled to a hearing before probation is revoked, at which time Petitioner may assert as a defense the reasons for non-payment. *Arthur v. Schoonfield*, 315 F. Supp. 548 (D. Md. 1970); Md. Ann. Code art. 38, § 4(b). But even thereafter to permit Petitioner, who, the Court of Special Appeals correctly noted (Petition at 14a), did not preserve this or any other sentencing issue for appeal, to appeal a revocation on the grounds of the invalidity of the conditions of probation would circumvent the appellate process. *Burch v. State*, 278 Md. 426 (1976); *Coleman v. State*, 231 Md. 220 (1963).

CONCLUSION

For the foregoing reasons, the instant case is not within the contemplation of Sup. Ct. R. 19, and Respondent thus prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

STEPHEN H. SACHS,
Attorney General
of Maryland,

STEPHEN ROSENBAUM,
Assistant Attorney General,
One South Calvert Building,
Calvert and Baltimore Streets,
Baltimore, Maryland 21202,
Counsel for Respondent.

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